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National Cable Television Association

Office of
Small System Operator

1724 Massachusetts Avenue, Northwest
Washington, D.C. 20036-1969
202 775-3687

July 17, 1996

EX PARTE

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Rm. 222
Washington, D.C. 20554

Re: CS Docket No. 96-98

Dear Mr. Caton:

On July 16, 1996, Lisa Schoenthaler of the National Cable Television Association ("NCTA") and Jake Landrum of Mid-Coast Cable Television met with Suzanne Toller of Commissioner Chong's office.

At the meeting, Mr. Landrum and Ms. Schoenthaler discussed the rural exemption and pole attachment issues covered in NCTA's comments and reply comments in the above-captioned proceeding. A summary of the pole attachment issues raised is attached.

Sincerely,



Lisa Schoenthaler

cc: Suzanne Toller, Esq. (w/enclosure)

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POLE ATTACHMENT ISSUES

1. **The Act Establishes a Broad Right of Access, Under Federal Rules.** Congress intended a broad right of access to poles, ducts, conduits, and rights-of-way (collectively hereinafter, "poles") under Section 224(f)(1). The Commission has clear authority under the 1996 Act to adopt rules to implement the right of access;^{2/} failure to do so would compromise the development of a competitive telecommunications marketplace, in contravention of the express purposes of the 1996 Act.

2. **The Act Places the Burden on Utilities to Justify a Refusal of Access.** Without any basis in law or policy, the utility commenters argue for the ability to warehouse pole space for their own future use, including for the provision of telecommunications services in competition with cable operators and other competitive local exchange carriers ("CLECs"). The Commission must reject these attempts by the utilities to assert monopoly control over poles, and place a heavy burden on utilities seeking to deny access. Insufficient pole space can always be remedied by rearranging lines, replacing a pole, or subdividing inner ducts. Cable companies and other CLECs should not be required to bear the costs of unnecessary pole modifications or modifications designed solely to benefit pole owners, however.

3. **Utilities Have Already Indicated Their Intent to Frustrate the Right of Access, Absent Clear Federal Rules.** In their comments, incumbent local exchange carriers ("ILECs") and electric utilities forecast their intention to discriminate against new entrants by contending that pole owners should be permitted to deny access in order to reserve space for their own future use and internal communications facilities.^{3/} The Public Service Company of New Mexico ("PNM") further suggests that refusal of access requests should be permitted to avoid "unnecessary duplication of facilities," and that carriers should be required to enter into resale or joint-use agreements to "retain some capacity for future, advanced telecommunications technologies." At the same time, PNM argues that utilities must be able to reserve capacity for themselves. The utilities argue that parties requesting access should bear the burden of proving that a denial is improper.^{4/}

^{2/} Section 251(d) requires the Commission to "establish regulations to implement the requirements of [Section 251], which indisputably includes Section 251(b)(4), "Access To Rights-Of-Way." Contrary to the argument of the Rural Telephone Coalition ("RTC") -- which incorrectly asserts that Congress was silent with regard to the Commission's rulemaking authority on anything other than "pole attachment charges" -- Congress explicitly provided in Section 224 that "[t]he Commission shall prescribe by rule regulations to carry out the provisions of this section."

^{3/} See, e.g., Ameritech Separate Comments at 36; BellSouth Separate Comments at 15; Cincinnati Bell Telephone Company Separate Comments at 7 ("Cincinnati Bell Separate Comments"); Duquesne Light Company Separate Comments at 16; Public Service Company of New Mexico Separate Comments at 11; Telecommunications Association (UTC) and Edison Electric Institute Joint Separate Comments at 6, 9-10 ("UTC and EEI Joint Separate Comments").

^{4/} See, e.g., Kansas City power and Light Company Separate Comments at 4; UTC and EEI Joint Separate Comments at 11; Puget Sound Power and Light Company Separate Comments at 5.

4. Denial of Access Will be Appropriate Only in Rare Circumstances. The utilities' proposals to restrict access plainly violate the 1996 Act. While the Act adopted a narrow provision that allows electric utilities to deny access where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes, it does not permit poles to be removed from joint use merely because the utility would prefer that only its own fiber be attached. Insufficient pole capacity can always be remedied by rearranging lines or replacing the pole with a taller one, and conduit congestion can be relieved by subdividing inner ducts. Issues of safety and reliability can be cured by compliance with the National Electric Safety Code ("NESC"). The instances where electric utilities can justify their reluctance to share poles and conduits for reasons of safety and reliability will be very rare.

Any utility claiming insufficient capacity on poles or in conduits, therefore, should bear the burden of demonstrating the factual basis for its denial. Attempts by utilities to require adherence to "safety and reliability" standards greater than the NESC should be presumed unreasonable. Proposed revisions to the NESC are subjected to extensive peer review, published in advance after committee evaluation, and then applied only on a prospective basis, with current facilities grandfathered to prior codes.

5. The Act Precludes Excessive "Make Ready" Requirements. A number of utilities are attempting to skirt Congress's desire to promote access without the imposition of unnecessary make ready costs. For example, Duke Power recently announced that, henceforth, any operator seeking access to its poles would have to install a taller pole, regardless of current pole capacity. This practice, if permitted, would dramatically change the economics of joint use by raising make ready costs from approximately \$2000/mile to \$35,000/mile.

Similarly, the statutory requirement that pole owners give written notification of modifications or alterations so that an attaching entity "may have a reasonable opportunity to add to or modify its existing attachment" may not be used as a excuse to require payment from parties that would be satisfied with the status quo. Even if the attaching entity benefits inadvertently from the owner's modification, it need not share in the financial burden.^{2/}

6. If an Attaching Entity Takes Advantage of an Owner's Modification to a Pole or Conduit, the Owner Attaching Entity May Only be Assessed a Proportionate Share of the Costs of Modification. Contrary to the suggestions of various utilities, the requirement that attaching entities bear a "proportionate share of the costs incurred by the owner" in modifying a pole or conduit to make the modification does not mean that utilities may impose "equal" costs on all entities that choose to make modifications in response to the notification. Determinations of "proportionate share" can be accomplished by application of a simple "but for" test. If the attaching entity's alteration does not add to the costs incurred by the owner for its own modification, the attaching entity should pay no portion of the costs.

^{2/} Only those parties choosing to add to or modify their existing attachments after receiving notification are required to "bear a proportionate share of the costs incurred by the owner." 47 U.S.C. § 224(h).